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THE INCOME TAX AMENDMENT.

"Mr. King asked what was the precise meaning of *direct* taxation? No one answered."

Madison's Journal of the Constitutional Convention. Aug. 20, 1787.

There are two clauses of the United States Constitution which are at the basis of the Income Tax controversy. They are as follows:

"Representatives and Direct Taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."[1]

"No capitation or other direct tax shall be levied unless in proportion to the census or enumeration hereinbefore directed to be taken."[2]

In 1895 the income tax provisions of the Wilson Tariff Act came before the Supreme Court of the United States in the case of *Pollock* v. *Farmers Loan & Trust Company*. On the first hearing[3] it was held that a tax on the rents or income from real estate is a direct tax and therefore could only be levied on the basis of apportionment. Upon a second hearing of the same case[4] the court held, by a vote of five to four, that a tax on the income from personal property is likewise a direct tax and must therefore be apportioned.

In July, 1909, the Congress of the United States, by a joint

[1]Article I, Section 2, Clause 3. The clause is given here as it appears in the original Constitution. The Fourteenth Amendment, of course, does away with the three-fifths rule.

[2]Article I, Section 9, Clause 4.

[3](1895) 157 U. S. 429.

[4](1895) 158 U. S. 601.

resolution adopted by two-thirds of both Houses, proposed an amendment to the Constitution in these words:

"Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The joint resolution (following Article V of the Constitution) provides that this proposed amendment shall become a part of the Constitution when ratified by the legislatures of three-fourths of the several States.

On January 5th, 1910, Governor Hughes sent a special message to the Legislature of New York. He stated, in substance, that he was in favor of conferring upon the federal government the power to lay and collect an income tax without apportionment; that this power, however, "should not be granted in such terms as to subject to Federal taxation the incomes derived from bonds issued by the State itself, or those issued by municipal governments organized under the State's authority"; that "the comprehensive words 'from whatever source derived' if taken in their natural sense, would include not only incomes from ordinary real or personal property, but also incomes derived from State and municipal securities"; and that while it might be urged that the amendment would be limited by construction, there "can be no satisfactory assurance" of such a result. Governor Hughes, therefore, recommended that the resolution be not ratified.

On February 17th, 1910, Senator Root wrote a letter dissenting from the view expressed by Governor Hughes. Senator Root believes that the proposed amendment does not enlarge the taxing power of the national government but merely relieves from the rule of apportionment the power which now exists to tax incomes. In his opinion, the words 'from whatever source derived' are "obviously intended to make the exemption from the rule of apportionment conclusive and applicable to all taxes on incomes." He argues, in substance, that the amendment must be construed in the light of the judicial and political history which led to its proposal; that this history shows that the end sought by the amendment was simply a removal of the restriction as to apportionment and not a change in the well settled rule which restrains the national government from taxing State securities; that this inability of the national government to tax State securities does not arise from any terms of the Constitution

itself but from the fact that such securities are the necessary instruments of carrying on other and sovereign governments and are "not the proper subject of national taxation, and that, therefore, no provisions of the Constitution, however wide the scope of their language, could be held to apply to such securities or to the income from them"; that the foregoing rule of construction is "just as controlling in defining the scope of the present amendment as it is in defining the scope of the existing provisions." He concludes, therefore, "that no danger to the powers or instrumentalities of the States is to be apprehended from the adoption of the amendment."

It will be noted that Governor Hughes himself suggests that the words of the proposed amendment *may* be limited by construction. He says, however, that there "can be no satisfactory assurance" of such a result. Does Senator Root's argument furnish such an assurance? If not, what change, if any, should be made in the form of the amendment? In considering these questions, it is necessary briefly to review that political and judicial history which Senator Root properly invokes.

For a proper understanding of the origin of the phrase "direct taxes" in the Constitution, we must begin with the days of the Confederation. We shall find two bitter controversies from the beginning: (1) a controversy between the large and small colonies as to their relative voice in federal affairs; (2) a controversy between the slave and non-slave colonies[5] as to the method of counting slaves either as a basis for contributions or as a basis for relative voting. These two questions were often intermingled. They led to compromise. As a result of the compromise—especially of the slave controversy—there was introduced into the Constitution a phrase recognized at the time to be vague. What disposition to make of that vague phrase is the question now before us.

I.

On September 5th, 1774, the Continental Congress first assembled. At the very outset the question arose as to voting. John Adams, in his Diary thus states the difficulty:

[5]Slaves were held in all of the thirteen colonies, but in 1776 the sentiment in favor of emancipation had grown very strong, especially in the Northern States. By 1785, all of the Northern States, except New Jersey and Delaware had made emancipation, immediate or gradual, compulsory. New Jersey, Delaware, Maryland and Virginia had stopped importation and removed all restraints upon emancipation. Fiske's Critical Period of American History 84 to 88.

"This is a question of great importance. If we vote by Colonies, this method will be liable to great inequality and injustice; for five small Colonies with one hundred thousand people in each, may outvote four large ones, each of which has five hundred thousand inhabitants. If we vote by the poll, some Colonies have more than their proportion of numbers, and others have less. If we vote by interests, it will be attended with insuperable difficulties to ascertain the true importance of each Colony. Is the weight of a Colony to be ascertained by the number of inhabitants merely, or by the amount of their trade, the quantity of their exports and imports, or by any compound ratio of both? This will lead us to such a field of controversy as will greatly perplex us. Besides, I question whether it is possible to ascertain, at this time, the numbers of our people or the value of our trade. It will not do in such a case to take each other's word; it ought to be ascertained by authentic evidence from records." [6]

The day after the Congress assembled it was moved that "a Committee be appointed to fix the mode of voting by allowing to each province one or more votes, so as to establish an equitable representation according to the respective importance of each Colony." The foregoing motion was lost. It was thereupon

"RESOLVED, That in determining questions in this Congress, each Colony or Province shall have one Vote.—The Congress not being possessed of, or at present able to procure proper materials for ascertaining the importance of each Colony." [7]

When the Continental Congress met in May, 1775, the British and Continental troops had already clashed in Massachusetts. No formal steps had yet been taken to confederate, but Congress was exercising an advisory, if not a directory, power over the several colonies. A war must be carried on. Money must be raised. On July 29th, 1775, it was voted:

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[6] Works of John Adams, II, 366.

[7] Journals of the Continental Congress (Edition of 1904), I, 25. For the debates upon these motions see Works of John Adams, II, 366 to 368. Patrick Henry thought "it would be a great injustice if a little colony should have the same weight in the councils of America as a great one." He said: "Slaves are to be thrown out of the question, and if the freemen can be represented according to their numbers, I am satisfied." Sullivan, from New Hampshire, "observed that a little colony had its all at stake as well as a great one." Thomas Lynch, of South Carolina, thought "it ought to be a compound of numbers and property that should determine the weight of the Colonies." Governor Ward, from Rhode Island, called attention to the inequality of the counties in Virginia, "yet each has a right to send two members." Lee and Bland, both from Virginia, argued that "we are not at present provided with materials to ascertain the importance of each colony." Gadsden, from South Carolina, could see no way of voting but by colonies. It was finally decided to give each colony one vote, but the resolution was so worded as to prevent its being relied upon as a precedent.

"That the proportion or quota of each colony be determined according to the number of Inhabitants, of all ages, including negroes and mulattoes in each colony."

Inasmuch, however, as the population could not at that time be ascertained, specific requisitions were made against each colony, to be later revised in accordance with the foregoing rule. It was also provided that each colony was to raise its quota "in such manner as may be most effectual and best adapted to the conditions, circumstances, and usual mode of levying taxes in such colony." [8]

On June 7th, 1776, the Continental Congress appointed a committee "to prepare and digest the form of a confederation to be entered into between these colonies." On July 12th, 1776, this committee brought in a draft. In this first draft Article XI provided that expenses "shall be defrayed out of a common Treasury, which shall be supplied by the several Colonies in Proportion to the Number of Inhabitants of every Age, Sex and Quality, except Indians not paying Taxes." [9] Article XVII provided that "In determining Questions each Colony shall have one Vote." [10]

On July 30, 31 and August 1, 1776, the foregoing provisions were warmly debated.[11] Mr. Chase, of Maryland, moved that Article XI be amended to the effect "that the quotas should be fixed, not by the number of inhabitants of every condition, but by that of the white inhabitants." John Adams argued that "the numbers of people were taken by this Article as an index of the wealth of the State and not as subjects of taxation, but that as to this matter it was of no consequence by what names you called your people, whether by that of freemen or of slaves." Mr. Harrison, of Virginia, "proposed as a compromise that two slaves should be counted as one freeman." Dr. Witherspoon, of New Jersey, suggested a way of avoiding the troublesome question of slaves by basing the quotas upon "the value of lands and houses" which he refers to as "the true barometer of wealth." Chase's amendment was put to a vote and lost.

As to the method of voting, Chase was willing that votes should be in proportion to numbers, but only "in votes relating

[8] Journals, II, 221.

[9] Journals, V, 548.

[10] Journals, V, 550.

[11] Works of Jefferson (Ford's ed.), I, 42 to 47. See also Works of John Adams, II, 494 to 501.

to money." Franklin thought "the votes should be so proportioned in all cases." He argued that "if we vote equally, we ought to pay equally; but the smaller States will hardly purchase the privilege at this price." Witherspoon advocated an equal vote for all the colonies because "nothing relating to individuals could ever come before Congress; nothing but what would respect colonies." Adams answered, "The question is not what we are now, but what we ought to be when our bargain shall be made. The confederacy is to make us one individual; it is to form us like separate parcels of metal, into one common mass." Wilson thought "taxation should be in proportion to wealth but that representation should accord with the number of freemen." [12]

The proposed Articles of Confederation were debated from time to time until November, 1777, as the pressing business of the war would permit. The questions of voting and paying were the most difficult ones to settle.[13] On October 7th, 1777, Congress took up in earnest the matter of voting. The resolution then before them was that "each State shall have one vote." Several amendments were proposed. It was moved that Rhode Island, Delaware and Georgia each be given one vote and that the other States should have one vote "for every fifty thousand white inhabitants," with a provision for adjustment to the end "that an equality in this National assembly may be observed as nearly as possible." This was lost, only Virginia and Pennsylvania voting in favor of it and North Carolina being divided. It was then moved that each State should send one delegate "for every thirty thousand of its inhabitants. and in determining questions in Congress each delegate shall have one vote." This, too, was lost, Virginia alone voting in favor of it. Virginia then tried to have representation proportioned to contributions, but she was alone in favor of the proposition. The original motion "that each State shall have one vote" was then carried. Virginia voted in the negative, North Carolina was divided and the other States all voted in the affirmative.[14] Thus the small States won their battle for equal representation.

[12]Works of Jefferson, I, 49 to 56. See also Works of John Adams, II, 494 to 501.

[13]On May 16, 1777, Jefferson wrote from Williamsburg to John Adams: "I hear from our delegates that the confederation is again on the carpet, a great and necessary work, but I fear almost desperate. The point of representation is what most alarms me, as I fear the great and small colonies are bitterly determined not to cede." Works of Jefferson, II, 305.

[14]Journals, IX, 779 to 782.

On October 13th, 1777, the question of contributions was taken up. It was moved that the proportion to be paid by each State "be ascertained by the value of all property except household goods and wearing apparel within each State, to be ascertained agreeable to the directions of Congress."[15] This motion was lost. It is interesting as showing that at this time a proposition was made and rejected that contributions should be based upon the valuation of personal as well as real property.[16] The following day the suggestion made by Dr. Witherspoon more than a year before was revived and Congress settled the question of contributions as follows:

"That the proportion of the public expense incurred by the United States for their common defense and general welfare, to be paid by each State into the treasury, be ascertained by the value of all land within each State granted to, or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as Congress shall, from time to time, direct and appoint.[17]

On November 15th, 1777, Congress reached an agreement upon the Articles of Confederation. They were not to go into effect, however, until adopted by all the States. On November 17th, a circular letter to the several States was approved. On June 20th, 1778, the Congress listened to reports and recommendations from the States. Massachusetts and Connecticut[18] tried to change the basis upon which contributions were to be paid. Congress, however, was unwilling to disturb a settlement, however unsatisfactory, that had been reached after so long a controversy. Accordingly, no amendments were accepted. On July 9th, 1778, the engrossed Articles were ready and the delegates who had the necessary authority signed them. It was March 1st, 1781, before Maryland, the last State, assented.

Before the Articles of Confederation had become legally operative, Congress recognized the insufficiency of the money raising power. James Madison took his seat in the Continental Congress on March 20th, 1780. For the next three years he labored manfully to patch up the Confederation, but to no avail.

[15] Journals, IX, 800.

[16] Those who later argued that the basis of measurement of the quotas under the Confederacy is of some importance in determining the meaning of "direct taxes" in the Constitution seem not to have made use of this. See Cong. Rec., Vol. 44, p. 1558.

[17] Journals, IX, 801.

[18] Journals, VIII, 638, 639.

On February 3d, 1781, Congress asked the States for special power to levy import duties on foreign merchandise. Some of the States acquiesced, some did nothing, and Rhode Island formally refused permission. Virginia, which had acquiesced in June, 1781, rescinded its consent in 1782, while Madison was on his way to Rhode Island to urge upon that State the necessity of the change.[19]

It was clearly recognized by this time that it was impossible to base the contributions of the States upon an assessed value of real property and buildings. The expense of an actual assessment under the direction of Congress would have been enormous, and to have the assessments made by the several States was to put a premium upon dishonesty.[20]

On January 28th, 1783, Madison introduced a new proposition for the establishment of permanent and adequate funds. He advocated the collection of a general revenue under the general superintendence of Congress, and again asked authority from the States to levy an impost.[21] It being urged that a valuation of the lands had not been attempted by Congress, it was voted, on January 31st, to proceed to make such an estimate.[22] The debates must be read to fully appreciate the bitterness and jealousies that existed at this time. Madison was almost in despair. On February 11th he wrote:

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[19]Hunt's Life of Madison 37. On January 22nd, 1782, Madison wrote to Randolph: "Virginia could never have cut off this source of public relief at a more unlucky crisis than when she is protesting her inability to comply with the continental requisitions. She will, I hope, be yet made sensible of the impropriety of the step she has taken, and make amends by a more liberal grant. Congress cannot abandon the plan as long as there is a spark of hope. Nay, other plans on a like principle must be added." Writings of Madison, I, 175-176.

[20]On January 14th, 1783, Madison wrote to Randolph: "The deliberations of Congress have been turned pretty much of late on the valuation of lands prescribed by the articles of confederation. The difficulties which attend that rule of apportionment seem on near inspection to be in a manner insuperable. The work is too vast to be executed without the intervention of the several states, and if their intervention be employed, all confidence in an impartial execution is at an end." Writings of Madison, I, 310.

On January 31, Madison records: "The sub-committee, consisting of Mr. Madison, Mr. Carroll & Mr. Wilson had this morning a conference with the Superintendent of Finance on the best mode of estimating the value of land through the U. S. The Superintendent was no less puzzled on the subject than the Committee had been." Writings of Madison, I, 353.

[21]Writings of Madison, I, 334 to 342.

[22]Hamilton favored trying such a valuation "in order that its impracticability and futility might become manifest." Dyer proposed "that each of the States should cheat equally." Madison's Writings, I, 355.

"The valuation of the lands of the United States as directed by the articles of Union has employed and puzzled Congress for the past week; and after all the projects and discussions which have taken place, we seem only to have gone round in a circle to the point at which we set out. The only point on which Congress are generally agreed is that something ought to be attempted; but what that something ought to be, is a theorem not solved alike by scarcely any two members; and yet a solution of it seems to be made an indispensable preliminary to other essays for the public relief. The Deputation from the army is waiting the upshot of all these delays and dilemmas." [23]

Again, on February 18th, he writes, referring to the proposition for import duties: *"Mercer, from what motive God knows, says that he will crawl to Richmond on his bare knees to prevent it."* [24] On March 4th and 5th the letter of resignation of Robert Morris as Superintendent of Finance was considered. Lee and Bland thought this letter an insult to Congress.[25] An insult to this Congress that strutted around in a circle while an unpaid army waited at the door!

On March 7th, 1783, the Committee on Revenue made an elaborate report urging the States to yield the power to tax imports to Congress under a plan by which the collectors would be appointed by the several States. The report further recommended an amendment of the Articles of Confederation to the effect that requisitions should be based not upon land valuations but upon the number of inhabitants. This brought up the old discussion as to the slaves. On March 25th, 1783, this feature of the report was debated and after several suggestions it was finally agreed, upon Madison's motion, that five slaves should be treated as equal to three freemen. On April 18th, 1783, the Revenue Report passed Congress by the vote of the representatives of all the States except New York and Rhode Island.[26] The Articles of Confederation required the proposed changes to be submitted to the States. On April 26th, 1783, an address was sent to the States. Adoptions came in slowly and when the Constitutional Convention met in 1787 the amendment with reference

[23] Writings of Madison, I, 364.

[24] Writings of Madison, I, 371.

[25] Writings of Madison, I, 396.

[26] Hamilton opposed it because the revenue was still to be collected by State officials. Madison's Writings, I, 453.

to the basis upon which requisitions should be paid by the several States had not yet been finally adopted.[27]

This, then, was the situation at the opening of the Constitutional Convention:

(1) The Continental Congress had no power to levy taxes or import duties but could only make requisitions upon the States, leaving the States to collect the money as they saw fit;

(2) The legal method by which the requisitions should be made was in proportion to the assessed value of the lands and buildings of the several States. This method, however, had never been put into operation and no general assessment was ever made thereunder;

(3) The legal method of apportioning requisitions having broken down, Congress recommended to the States a change by which requisitions should be based upon population counting five slaves the equal of three freemen. When the Constitutional Convention met, however, this recommendation had not become legally effective through the required adoption by all the States.

II.

The Federal Convention was called for May 14th, 1787. The presence of seven States, however, was not secured until May 25th, on which date the Convention organized. While the Virginia delegates were awaiting the opening of the Convention, they held frequent meetings and prepared what are known as the Virginia Resolutions, setting forth in broad outlines a proposed form for the new government. These resolutions were introduced on May 29th. The second Virginia resolution was as follows:

"Resolved therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution,

[27]Meanwhile the Confederacy staggered along. On October 3rd, 1785, Madison, who was then out of Congress, writes to Jefferson: "Congress have kept the vessel from sinking, but it has been by standing constantly at the pump, not by stopping the leaks which have endangered her. All their efforts for the latter purpose have been frustrated by the selfishness or perverseness of some part or other of their constituents." Madison's Writings, II, 178-179.

On February 24, 1787, he writes to Pendleton, "the Present System neither has nor deserves advocates; and if some very strong props are not applied, will quickly tumble to the ground. No money is paid into the public Treasury; no respect is paid to the federal authority. Not a single State complies with the requisitions: several pass them over in silence, and some positively reject them." Madison's Writings, II, 318.

or to the number of free inhabitants, as the one or the other rule may seem best in different cases." [28]

This struck directly at the rule in the Articles of Confederation that each State should have an equal voice. It was a serving of notice by the large States upon the small that the compromise that had been assented to on September 6, 1774, and continued in the Articles of Confederation under the pressure of war was not to be perpetuated. On May 30th the Virginia Resolutions were referred to a Committee of the Whole on the State of the Union, together with a draft of a plan presented by Pinckney. The resolutions were considered in Committee, one by one until June 13th, on which day they were reported back to the Convention as amended by the Committee of the Whole.

The second resolution of the Virginia plan had at this time been amplified as follows:

"7. Resolved that the rights of suffrage in the 1st branch of the National Legislature, ought not to be according to the rule established in the articles of confederation but according to some equitable ratio of representation namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes in each State:

"8. Resolved that the right of suffrage in the 2nd branch of the National Legislature ought to be according to the rule established for the first." [29]

At this time it was distinctly the sense of the Convention that the new government was to be a national government. The sixth resolution of the Virginia plan had provided, without going into detail, for the broadest powers for the new Congress.[30] This resolution had also been debated in the Committee of the Whole and had been reported to the Convention on June 13th in the following form:

"6. Resolved that the National Legislature ought to be empowered to enjoy the Legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent; or in which the harmony of the

[28]Documentary History of the Constitution (1900), III, 17. This and the following references to "Doc. Hist." are to Madison's Journal of the Convention as it appears in the copy printed in the Documentary History prepared under the direction of the State Department.

[29]Doc. Hist., III, 121. It will be remembered that in the Convention the first branch of the legislature means the *lower* House of Congress.

[30]Doc. Hist., III, 18.

U. S. may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union, or any treaties subsisting under the authority of the Union." [31]

If the new government had been formed upon the frame of these Virginia Resolutions as adopted by the Committee of the Whole it would have had a much stronger national cast than it was subsequently given. One of the marked things, however, in the history of the Convention is the strength which the small State men gathered as the Convention progressed. Repeatedly defeated, they kept insisting upon their point until their persistence forced a compromise. When the report of the Committee of the Whole was received by the Convention, Patterson, of New Jersey, moved an adjournment to permit a purely federal [32]—as opposed to a national—plan to be digested. On June 15th Patterson reported his plan. It advocated a confederation, but a greatly reformed one. The federal government was given power to levy import duties and certain stamp duties and was also given the revenues of the post-office. Further revenue must be secured by requisitions upon the several States in proportion to population, according to the rule adopted on April 18th, 1783.[33] Had this plan been followed, the result would have been an amendment of the Articles of Confederation to give it stronger powers than Madison had contended for in the Congress of 1783. So far had men's minds marched in those four years, however, that the national party did not consider for a moment stopping with Patterson's plan. On June 16th the Virginia Resolutions, together with Patterson's plan, were again referred to the Committee of the Whole. After three days the Committee reported the Virginia Resolutions again to the Convention without amendment. From June 19th to July 26th the Virginia Resolutions were debated one by one in the Convention. These were the critical days of the Convention.

On June 27th Mr. Rutledge moved "to postpone the 6th Resolution, defining the powers of Congress; in order to take up the 7 and 8 which involved the most fundamental points, the rules of suffrage in the 2 branches." [34] On June 29th

[31]Doc. Hist., III, 121.

[32]On May 30, Gouverneur Morris had explained "the distinction between a *federal* and *national, supreme,* Government; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and *compulsive* operation." Doc. Hist., III, 22.

[33]Doc. Hist., III, 125 to 128.

[34]Doc. Hist., III, 224.

it was voted "that the rule of suffrage in the 1st branch ought not to be according to that established in the Articles of Confederation." [35] As early as June 11th Sherman had suggested that the suffrage in the first branch be based upon numbers, "and that in the second branch or Senate, each State should have one vote and no more." [36] Immediately after the passage of the resolution that the rule of suffrage in the lower House ought not to be according to the rule adopted in the Articles, Ellsworth moved that in the second branch of the Legislature of the United States each State should have an equal vote. Wilson and King strongly opposed the motion. Franklin suggested compromise. Bedford, of Delaware, made his bitter speech suggesting that the small States "will find some foreign ally of more honor and good faith." On July 2nd Ellsworth's motion was voted upon and resulted in a tie. Thereupon a committee with one member from each State was appointed by ballot to report a compromise. This committee met from July 2nd to July 5th and reported back what has been called the Great Compromise. In the report of the Committee it was as follows:

"That the subsequent propositions be recommended to the Convention on condition that both shall be generally adopted. I. that in the 1st branch of the Legislature each of the States now in the Union shall be allowed 1 member for every 40,000 inhabitants of the description reported in the 7th Resolution of the Committee of the whole House: that each State not containing that number shall be allowed 1 member: that all bills for raising or appropriating money, and for fixing the Salaries of the Officers of the Government of the United States shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch; and that no money shall be drawn from the public Treasury, but in pursuance of appropriations to be originated in the 1st branch. II. that in the 2d branch each State shall have an equal vote." [37]

By the first paragraph of this report the lower House was to have one member for every 40,000 inhabitants of the description reported in the seventh resolution of the Committee of the Whole. This description was that under which the slaves were counted for three-fifths. The old question of the whites and the blacks was therefore up again. On July 6th Gouverneur Morris moved to send this portion of the report back to a special committee. His view was that the Constitution should fix definitely the number of representatives for each State in the first instance and

[35] Doc. Hist., III, 245.
[36] Doc. Hist., III, 101.
[37] Doc. Hist., III, 270.

authorize the legislature to make changes thereafter. The Convention, after considerable discussion, referred the first paragraph of the Great Compromise to a new committee of five, headed by Gouverneur Morris.

On July 7th, the Convention, by a vote of six to three, approved the second paragraph of the Great Compromise. This, if adhered to, settled the question of an equal vote for each State in the upper House. From this time on the battle was not so much a controversy between the large and small States as a controversy between the slave States and the States opposed to slavery.

On July 9th the special committee of five headed by Morris made its report. They allotted a certain number of representatives in the lower House of the first Congress to each State, Delaware and Rhode Island being the lowest with one each, and Virginia being the highest with nine. They provided for future changes by giving the legislature a broad power from time to time to regulate the number of representatives "upon the principles of their wealth and number of inhabitants." The plan for future changes was accepted without debate but objections were at once aimed at the allotment of representatives in the first Congress. Gouverneur Morris stated that this representation had been based partly upon wealth and partly upon numbers. This question of the allotment was then referred to a new committee, one from each State. On July 10th this new committee reported, changing slightly the allotment of representatives. Several motions were made to change the allotment to particular States, but all were lost. The allotment of representatives in the first Congress was then approved. Meanwhile the question as to how the representation should be varied with changes in population and wealth had been reopened. Should future representation be based upon property or numbers? If upon numbers, how should slaves be counted? It was strongly urged that numbers alone were not sufficient. Gouverneur Morris argued that new States admitted from the West should not have equal representation but that such questions should be left to future congresses to determine. The question of slaves, however, was the serious one. On July 11th this question was debated with much feeling. The South Carolina delegates insisted that slaves should all be counted; Morris and King objected to counting them at all; and moderate men advocated the old three-fifths rule. Williamson moved to base the alterations in the representation upon a census of the free whites and three-fifths of those of other descriptions.

The Convention at one time on this day voted not to count any of the slaves but to base the representation upon the census of the whites, the census to be taken every fifteen years. Williamson's motion was thus amended and passed clause by clause, only to be rejected as a whole. The votes taken before adjournment on the 11th of July indicate how confused the delegates were.

With the Convention in this condition, Gouverneur Morris, on July 12th, moved to add to the clause empowering the legislature to vary the number of representatives a proviso that "taxation shall be in proportion to Representation." [38] Mason suggested that this might drive the legislature to the plan of requisitions. Morris admitted that the rule would be inapplicable "with regard to indirect taxes on exports and imports and on consumption," and then amended it to read, "provided always that direct taxation ought to be proportioned to representation." Gouverneur Morris was the last man in the Convention from whom such a suggestion could come with sincerity. He had been a delegate from New York to the Continental Congress for two years. He had failed of re-election apparently because his State believed that his views were too national.[39] He was singularly free from State attachment, having represented New York in the old Congress and now representing Pennsylvania in the Convention.[40] He had served as Assistant Superintendent of Finance under Robert Morris. No one knew more intimately than he the impracticability of the discredited requisition system. Yet this motion of his, if carried in its original form, meant requisitions. It would have made it practically impossible for the new government to levy import duties. Even when modified, at Mason's suggestion, there was a grave question whether it would not require requisitions.[41] Fortunately we are not left to conjecture for the motive of Morris. He frankly confessed at a later date that it was his purpose in joining taxation with representation to lessen the desire of the South to have their slaves counted. No strategic move ever

[38] Doc. Hist., III, 319.

[39] Sparks' "Life of Gouverneur Morris," Vol. I, p. 215.

[40] On July 8th he had asked: "What if all the Charters and Constitutions of the States were thrown into the fire, and all their demagogues into the ocean. What would it mean to the happiness of America?" Doc. Hist., III, 293.

[41] On May 8, 1789, after the Constitution had been adopted, Gouverneur Morris wrote: * * * "there is a further inconvenience, which arises from the necessity of apportioning direct taxes in a manner fixed by the Constitution. This, which seems to force Congress into requisitions, leads thereby to perpetuate that ineffective system * * *" Sparks' "Life of Gouverneur Morris," Vol. III, p. 471.

failed of its purpose more signally. The South Carolina delegates were entirely willing to purchase additional representation at the price Morris had fixed. In fact, they used the argument that they were paying for their representation as a reason for claiming that all the slaves should be counted.

After considerable further discussion, on July 16th, the Great Compromise as amended was finally accepted. The form in which representation in the lower House was left was most involved. Wilson had thought "less umbrage would perhaps be taken against an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation; and as representation was to be according to taxation, the end would be equally attained."[42] The Great Compromise accordingly fixed the representation in the lower House of the first Congress by specific numbers; it gave the legislature the authority thereafter to regulate the number of representatives upon the principle of the number of the inhabitants provided "that representation ought to be proportioned according to direct taxation"; it provided further that, in order to ascertain "the alteration in direct taxation which may be required from time to time" a census should be taken of all inhabitants of the United States "in the manner and according to the ratio recommended by Congress in their resolution of the 18th day of April, 1783." Note how carefully the slave question is touched. Representation is to be according to direct taxation; direct taxation is to be according to the inhabitants; the inhabitants, however, are to be counted in accordance with the old rule of April 18th, 1783. No mention of the word "slaves"! To such a circumlocution do they go in order to salve the feelings of the extreme anti-slavery men.

The perplexing debates of these days must be read to appreciate how little attention was given to the meaning of "direct taxation." It had already been voted that each State was to have equal representation in the upper House. The question at issue was representation in the lower House. All agreed that in the lower House representation should be based upon the relative importance of the States. But how determine that importance? The debates take on the tinge of 1774. At any time during the Confederation, those who were contending for pro-

[42]Doc. Hist., III, 322-323.

portional representation would have been glad to accept requisitions as a basis. Requisitions were the only source of revenue of the Confederation. When the Convention met in 1789, however, there was an overwhelming majority against the requisition system. The sixth Virginia resolution gave the broadest powers to the national government. On June 28th, Madison had said, without contradiction, that "a compleat power of taxation, the highest prerogative of supremacy, is proposed to be vested in the national Government." It was not, however, until the Committee of Detail reported on August 6th, that the taxing powers were specifically given the national government. When the bitter debate of the middle of July was going on, it was not yet certain that the national government would get the power which it did ultimately get to levy and collect "taxes, duties, imposts and excises" without the mediation of the separate States. As late as August 21, Luther Martin moved to make requisitions upon the States for their respective quotas, and to collect the taxes directly from individuals only in case the States neglected to comply. If the national Congress had been limited to requisitions in all cases except imports and certain stamp duties, as was proposed in Patterson's plan which was still before the Convention, the apportionment of "direct taxation to representation" would have had a distinct meaning. It would have clearly meant the collection of quotas from the States. When, however, the Convention later gave the national government the complete power of taxing, the term "direct taxation" became a most confusing phrase. Elbridge Gerry almost brought the Convention to a discussion of this question. On July 13th, immediately before the vote was taken upon Williamson's motion which involved apportionment of "direct taxation," Gerry urged "that the principle of it could not be carried into execution as the States were not to be taxed as States." Ellsworth interrupted him to say that "the sum *allotted* to a State may be levied without difficulty according to the plan used by the State in raising its own supplies." Gerry's question might perhaps have led to a reconsideration, if the ice had not been too thin for any retracing of steps.[43]

[43]It should be noted that on July 11th Madison had said that it seemed to be understood on all hands that future contributions "would be principally levied on imports & exports." That Gerry seems to have been satisfied by Ellsworth's answer to his question is strikingly illustrated by Gerry's motion on July 13th to make "direct taxation" proportional with representation *even before the census was taken.* This motion was first lost and then carried when he made it clear that "direct taxation" was to be levied by assessments upon the States and not upon the inhabitants.

On July 14th, a motion had been made by Rutledge to reconsider certain portions of the compromise. Sherman opposed it. "It was he said a conciliatory plan, it has been considered in all its parts, a great deal of time has been spent on it, and if any part should now be altered, it would be necessary to go over the whole ground again." [44] On July 17th, Gouverneur Morris moved to reconsider the whole compromise resolution (including equality in the Senate), until the power of the general government had been determined. His motion received no second. Madison adds: "It was probably approved by several members, who either despaired of success, or were apprehensive that the attempt would inflame the jealousies of the smaller States." [45] On July 26th the Virginia Resolutions as revised by the Convention were referred to a Committee of Detail appointed on July 24th. On July 24th Gouverneur Morris had expressed the hope that the Committee of Detail would cut out entirely the clause "proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulph; having passed the gulph, the bridge may be removed." [46]

On August 6th the Committee of Detail reported back the first detailed draft of a constitution. Article VII, Section 1, gave the national legislature power "to lay and collect taxes, duties, imposts and excises." The clauses relating to representation and "direct taxation" were in this draft separated. Article IV, Sections 3 and 4, provided for representation in the lower House by specific numbers at first and thereafter in accordance with the number of inhabitants. Article VII, Section 3, provided that the proportions of "direct taxation" should be regulated by the number of inhabitants counting the slaves by the three-fifths rule. When Section 4 of Article IV came before the Convention on August 8th it was amended to make clear that the census of inhabitants upon which representation was to be based was to follow the same rule as the census provided in connection with the "direct taxation" clause. Gouverneur Morris made another strong speech against this clause which was his own offspring. "He would sooner submit himself to a tax for paying for all the Negroes in the United States than saddle posterity with such a Constitution." He gets from Sherman the answer, "It was the

[44] Doc. Hist., III, 333.

[45] Doc. Hist., III, 349.

[46] Doc. Hist., III, 422.

freemen of the Southern States who were in fact to be represented according to the taxes paid by them, and the Negroes are only included in the Estimate of the taxes." [47]

On August 20th, Section 3 of Article III, which apportioned "direct taxation," came before the Convention. Rufus King asked "what was the precise meaning of *direct* taxation." [48] In the original Journal the word "direct" is underlined. Madison significantly records that "No one answered." In later years a comfortable doctrine grew up that it was not any lack of clearness of ideas that left Rufus King's question unanswered. Senator Borah of Idaho, in a speech in the Senate on May 4th, 1909 thus expresses such a view: "I believe that the fathers, when the history of the surrounding circumstances is clearly studied, will be found to have known and understood precisely the definition of the phrase 'direct taxes' and that especially would the careful makers of that great instrument have refrained from putting into the Constitution a phrase which was ambiguous after their attention had been called to the fact that it was ambiguous." [49] This does credit to Senator Borah's reverence for the fathers, but it is not history. It ignores the fact that the Convention from which this Constitution was evolved was one long battle, a battle in which men's passions had run high, a battle in which more than once the ultimatum had been given. The "careful makers of that great instrument" were great men. But they were human. George Mason of Virginia, a man of the highest rank, on August 31st declared "that he would sooner chop off his right hand than put it to the Constitution as it now stands." [50] The feeling ranged all the way from his view to that expressed by the wise Franklin on September 17th: "I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them" [51] Probably not a man left the Convention fully satisfied with either the substance or the phraseology of the Constitution. As Alexander Hamilton later said in the New York Convention, "Let a convention be called tomorrow; let them meet twenty times,—nay, twenty thousand times; they will have the same difficulties to encounter, the same

[47] Doc. Hist., III, 476, 478.

[48] Doc. Hist., III, 573.

[49] Cong. Rec., Vol. 44, p. 1694.

[50] Doc. Hist., III, 659.

[51] Doc. Hist., III, 761.

clashing interests to reconcile." [52] It is to detract from the ability and character of the framers of the Constitution to assume that they were satisfied with their work. To their lasting credit it should always be remembered that they took not what they wanted, but what they could get.

Rufus King's question was not answered because no man in the Convention was able to answer it. He asked for a "precise" definition of "direct taxation." As a matter of fact no man has yet satisfactorily answered that question.[53]

The subsequent history in the Convention of the clauses in question can be briefly referred to. On September 8th the draft of the Committee of Detail as amended was referred by the Convention to the Committee on Style. The Committee reported on September 12th. Article I, Section 2, Clause 3, brought together again the two clauses as to representation and taxation. At this stage "direct taxation" was abandoned and "direct taxes" substituted. The clause as reported coupled "Representatives and direct taxes" and apportioned both among the States in accordance with a census to be taken by the three-fifths rule. In the discussion of the report, on September 13th, it was moved by Dickinson and Wilson to strike out "and direct taxes" as improperly placed in a clause relating merely to the constitution of the House of Representatives. Gouverneur Morris, who had taken a leading part in the work of the Committee on Style, answers, "The insertion here was in consequence of what had been passed on this point; in order to exclude the appearance of counting the Negroes in the Representation. The including of them may now be referred to the object of direct taxes, and incidentally only to that of Representation." [54] The motion to strike out was lost, and in this respect the clause went unchanged into the final

[52]Elliott's Debates, Vol. II, 236.

[53]Ex-Senator George F. Edmunds, in his argument in the Pollock case, in answer to a question from Mr. Justice Harlan, says (157 U. S. 491): "My definition is—and I believe it to be generally found to be universally true—that a direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit or acts, as importing goods which he may import or not import as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being." It may be admitted that the foregoing is a definition; it will hardly be claimed that it is a "precise" one.

[54]Doc. Hist., III, 739.

draft of the Constitution as agreed to on September 15th and signed by the members of the Convention on September 17th.

On September 14th there was added to Article VII, Section 8, which gave the general power to levy and collect "taxes, duties, imposts and excises," the clause providing that "all duties, imposts and excises shall be uniform throughout the United States." This proviso had appeared in a different form on August 25.

The history in the Convention of Article I, Section 9, Clause 4, of the Constitution is much shorter. The Committee of Detail reported, as Article VII, Section 5, "No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken." This clause was bound up in the bitter controversy over navigation acts, export duties, and the prohibition of the importation of slaves. It went unchanged through the special Compromise Committee appointed on August 22nd. It came back from the Committee on Style, as Article I, Section 9, Clause 4, but still unchanged. On September 14th, it came before the Convention. There had been some discussion during the Convention about collecting the back requisitions due under the rule of the Confederacy. Read of Delaware feared this capitation tax might be used to "saddle the States with a readjustment by this rule, of past Requisitions." He moved to insert "or other direct tax" after the word "capitation." He thought "that his amendment by giving another cast to the meaning would take away the pretext." His motion was agreed to without discussion.[55]

In the Committee of Detail the clause restricting taxes or duties upon exports also found its origin. The clause became Article I, Section 9, Clause 5 in the final draft of the Constitution.[56]

As the Constitution went to the people, this then was the situation:

Congress had power to lay and collect "taxes, duties, imposts and excises," for national purposes, with the following limitations:

[55]Doc. Hist., III, 747.

[56]For the history in the Convention of any of the clauses which have been discussed, see William M. Meigs' "Growth of the Constitution" (1900). It was urged by counsel in the Pollock case, and apparently approved by the majority of the court, that the large States when they granted equal representation in the Senate insisted upon the apportionment of direct taxes. This view has been recently repeated in the memorandum submitted to the New York Legislature on April 11th, 1910, by Mr. Choate, Mr. Guthrie, and others. For a very complete answer to such a contention see the careful article of Professor Charles J. Bullock, XV Political Science Quarterly (1900), 217-239, 452-481.

(a) "Duties, imposts and excises" must be uniform throughout the United States;

(b) "Direct Taxes" must be apportioned among the several States, and a capitation tax is expressly made a direct tax within this rule;

(c) No "tax or duty" could be levied upon articles exported from any State.

When the foregoing is subjected to analysis, it becomes most puzzling. What are "taxes" as opposed to "duties, imposts and excises"? Is there such a thing as an indirect tax which is not included in "duties, imposts and excises"? If so, is such a tax subject to neither the rule of uniformity nor the rule of apportionment? Are "direct taxes" merely requisitions upon the States? In what sense then is a capitation tax a direct tax? Is "direct tax" used in an economic sense? Where then is the line between a "direct tax" and an "excise" or a "duty"? Finally, why was it necessary to forbid a "tax" as well as a "duty" upon exports? Is "tax" here used in the same sense that is to be given it in the other clauses?

It is little wonder that in the debates in the various State conventions and in the controversial literature of the time we find the greatest diversity of opinion as to the meaning of the taxing clauses. Richard Henry Lee put his finger on the difficulty.[57] He pointed out that the clause requiring apportionment of direct taxes favored "the idea suggested by some sensible men and writers that congress, as to direct taxes, will only have power to make requisitions; but the latter clause, power to lay and collect taxes, &c., seems clearly to favour the contrary opinion." Lee considered the taxing powers undefined "because judicious men understood them differently" [58]

[57]Ford's Pamphlets on the Constitution 310.

[58]It must not be forgotten that the Convention simply recommended a constitution. The people voting through their State Conventions adopted it. They had to take the words as they found them without the help (or the hindrance) of the debates in the Convention which were not made public for years after the Constitution had been adopted. For views expressed in the Massachusetts Convention see Ell. Deb., Vol. II, 36, 41, 42, 44, 54 to 77; in the Connecticut Convention, see Ell. Deb., Vol. II, 190 to 195; in the New York Convention, see Ell. Deb., Vol. II, 330 to 394; in the Maryland Convention, see Ell. Deb., Vol. II, 552, 554; in the Virginia Convention, see Ell. Deb., Vol. III, 29 to 41, 57, 58, 95 to 109, 114 to 137, 148, 149, 166 to 168, 181, 205, 214 to 216, 222 to 236, 243 to 271, 280, 284 to 287, 299 to 301, 305 to 308, 320 to 329, 457, 458; in the North Carolina Convention, see Ell. Deb., Vol. IV, 75 to 94, 188 to 190, 220; in the South Carolina Legislature, Ell. Deb. IV, 289, 305; in the Pennsylvania Con-

III.

On June 5th, 1794, Congress levied a tax on carriages "for the conveyance of persons which shall be kept by or for any person for his or her own use, or to be held out for hire, or for the conveying of passengers." The tax was part of Alexander Hamilton's financial program. Madison urged that it was a direct tax and unless apportioned, would be unconstitutional.[59] Congress took the opposite view. The constitutionality of the tax came before the Supreme Court in 1796 in the *Hylton* case.[60] This case was argued on behalf of the Government by Alexander Hamilton who had resigned as Secretary of the Treasury in 1795, and was at this time a practicing lawyer. A fragment of Hamilton's argument has survived.[61] There is no more important contribution to this subject than the four short pages of Hamilton's brief. Hamilton might have argued, as men have since done, that the framers of the Constitution clearly intended "direct taxes" to mean taxes upon land and a capitation tax. He might have pointed to the draft of the Constitution which he had himself prepared in which he had provided for an apportionment of "taxes on lands, houses and other real estate, and capitation taxes." [62] But whatever may have been Hamilton's faults, he never ran away from a difficulty. For one with a boundless imagination, he had a rare capacity for looking facts squarely in the face. And he grasped this nettle of direct taxes firmly. His brief opens with this sentence:

"What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague

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vention, see McMaster and Stone on Pa. and the Fed. Const., pp. 269, 274, 292, 327 to 329, 345, 346, 372, 373, 387 to 389. See also the Federalist, Nos. 12, 21, 30-37, 54, 56; Ford's Pamphlets on the Constitution, 48, 49, 160, 253, 301, 302; Ford's Essays on the Constitution, 235; McMaster and Stone on Pa. and the Fed. Const., 477, 478, 581, 587, 588, 610.

Isolated passages from the Debates are of little historical value unless we first ascertain the attitude of the one speaking. It is but natural that men who opposed the Constitution should magnify the federal powers and that men who favored the Constitution in answering the argument should minimize the federal powers.

[59]The paths of Madison and Hamilton had at this time parted, the former now being a party lieutenant of Jefferson's.

[60](1796) 3 Dallas 171.

[61]Works of Hamilton (Fed. ed.), VIII, 378.

[62]Doc. Hist., III, 784. Neither this plan of Hamilton's nor Pinckney's plan are taken into account in the foregoing outline of the history of the clauses in question. Hamilton's plan was not handed to Madison until about the close of the Convention. Pinckney's plan as printed in the Journal is known not to be the plan he actually submitted.

in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms—there is none."

Those are strong words "We shall seek in vain for any antecedent settled legal meaning"; but Hamilton does not stop there. He goes on:

"We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point."

Hamilton then illustrates the vagueness of the phrase. He shows the difficulty of applying the rule of shiftability. If we state that a direct tax is one where the incidence of the tax is upon the party who pays it in the first instance, then no tax is direct because every tax to some extent may be shifted. If we make the criterion of a direct tax the fact that a man is conscious of paying it, we introduce a most impractical distinction because the character of the tax would then depend upon the intelligence of the party who pays it. The same tax would be direct as to one and indirect as to another.

Having shown the vagueness of the phrase, Hamilton urges that the Constitution be interpreted in such a way as will permit the national government to exercise the powers given. It clearly has the power to levy taxes. If this tax on carriages must be apportioned, the result might follow that a portion of the tax should be charged against a State which had no carriages. Therefore, to apply the rule of apportionment might take away the power of the federal government to tax carriages at all. He does not argue that the *test* is whether or not the tax can be apportioned. That unsupportable doctrine is the product of men who insisted upon finding a clear test where there was no clearness.[63] This is Hamilton's conclusion:

"But how is the meaning of the Constitution to be determined? It has been affirmed, and so it will be found, that there is no general principle which can indicate the boundary between the two. That boundary, then, must be fixed by a species of arbitration, and ought to be such as will involve neither absurdity nor inconvenience."

The foregoing contains the crux of Hamilton's argument. The line between direct taxes and indirect taxes must be fixed "by a

[63]Senator Sutherland shows the difficulty of supporting such a test by asking whether taxes on all buildings 12 stories in height or upon all buildings with a value exceeding $5,000,000 would be direct taxes. Clearly these are taxes on land and therefore concededly direct taxes. There might well be States, however, to which no part of such a tax could be apportioned. Cong. Rec., 44, 1699.

species of arbitration, and ought to be such as will involve neither absurdity nor inconvenience." Hamilton suggests that a good place to draw the line is to call capitation taxes, taxes on lands and buildings and general property taxes, "direct taxes," and all other taxes "indirect taxes." One cannot read his brief and feel that he thinks this a logical or even a satisfactory dividing line. He expressly says that the words are vague and indefinite; that a settled meaning of them will be sought in vain; and that no satisfactory disposition of them can be made. His prophecy was as accurate as his history.

The Supreme Court unanimously accepted Hamilton's reasoning. Wilson and Patterson, leading figures on opposite sides in the Federal Convention, took part in the decision. Patterson sees the same trouble that Hamilton saw. Of the words "direct taxes" he says:

"They present no clear and precise idea to the mind."[64]

Of the rule of apportionment he says:

"Apportionment is an operation on states and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain and efficacious.[65]

The only thing decided in the *Hylton* case was that the carriage tax was not a direct tax within the meaning of the Constitution. Both Patterson and Chase express doubt whether anything but capitation taxes and taxes on land are "direct taxes." The result is a decided step towards Hamilton's settlement by a "species of arbitration."

In 1868 the Supreme Court held in the case of *Pacific Insurance Co.* v. *Soule,*[66] that a tax upon the income of insurance companies was not a "direct tax." Counsel for the insurance company argued for an economic definition of "direct taxes." Mr. Evarts, Attorney-General, simply relied upon the *Hylton* case. The court held unanimously that the tax was not a direct tax. The difficulty of apportionment is again relied upon and there is a tendency to make the possibility of apportionment the test of whether or not a tax is a direct tax. The *dicta* of Chase and Patterson that probably capitation taxes and taxes on land are the

[64](1796) 3 Dallas 171, 176.
[65]*Id.* at p. 180.
[66](1868) 7 Wall. 433.

only direct taxes within the Constitution, are quoted. The result is another step toward Hamilton's settlement by a "species of arbitration."

In *Veazie Bank* v. *Fenno*,[67] a tax on the notes of a State Bank was attacked as a direct tax and unconstitutional because not apportioned. Mr. Hoar, the Attorney-General of the United States, relied again upon the *Hylton* case and upon Hamilton's brief, which had then been recently published. Chief Justice Chase says:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results.

"It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes."

Here is another decided step toward drawing a line—a practical line—by Hamilton's "species of arbitration."

In *Scholey* v. *Rew*[68] the succession tax imposed upon the devolution of real estate was before the court. The court held it was not a direct tax within the constitutional rule requiring apportionment, saying:

"Whether direct taxes in the sense of the Constitution comprehend any other taxes than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the owe involved in the present controversy."

In *Springer* v. *United States*[69] the income tax of June 30th, 1864, was before the Supreme Court. Springer's statement, filed under the Act, showed that his income during the year 1865 had been $50,798. How much came from property and how much from industry the report does not show.[70] Springer refused to pay the tax thereon. The United States collector caused

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[67](1869) 8 Wall. 533, 541, 544.

[68](1874) 23 Wall. 331, 347.

[69](1880) 102 U. S. 586.

[70]Mr. Chief Justice Fuller states in the Pollock case that the record shows that Springer's income was from industry and from United States bonds. Inasmuch as the Supreme Court, in the Pollock case, held the whole income tax unconstitutional, because it included a tax upon income from real and personal property, it would seem clear that if the same reasoning had been applied to the Springer case the whole Act there would also have been held unconstitutional.

a warrant to be issued and levied upon Springer's real estate, including his dwelling house and barn. The property was sold and bought in by the United States. The case before the court was an action of ejectment brought by the United States against Springer who relied upon the unconstitutionality of the Income Tax Law because it was a direct tax and had not been apportioned. The court reviews the history of the clause, quotes the extract from Hamilton's brief stating that we "shall seek in vain for any antecedent settled legal meaning," quotes also his suggestion that the vague boundary line be fixed by a "species of arbitration," reviews the legislative and judicial history of the clause and comes to this conclusion:

"Our conclusions are, that *direct taxes,* within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 177; *Pacific Insurance Co.* v. *Soule,* and *Scholey* v. *Rew, supra.*

"Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply.

"The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to." [71]

This was a severe blow to the economic definition. A most decided step had been taken toward clearing up an ambiguous phrase by a "species of arbitration."

Meanwhile, a legislative construction of the phrase "direct taxes" had been growing up. Congress enacted laws levying direct taxes under the rule of apportionment in 1798, 1813, 1815, 1816 and 1861. The first four of these acts were limited to lands, improvements, dwelling houses and slaves. The act of 1861 covered lands, improvements and dwelling houses only.[72]

[71] (1880) 102 U. S. 586, 602-3.

[72] Act of July 14, 1798, c. 75, 1 U. S. Stat. at L. 597; Act of Aug. 2, 1813, c. 37, 3 *id.* 53; Act of Jan. 9, 1815, c. 21, *id.* 164; Act of March 5, 1816, c. 24, *id.* 255; Act of Aug. 5, 1861, c. 45, 12 *id.* 294. For the amounts collected under these taxes, see Dewey's Financial History of the United States 109, 139, 140, 277. For the first "Direct Tax," see Gibbs' Administrations of Washington and John Adams, I, 141, 345, 422 to 425; II, 66, 67. See also Wolcott's Report of December 14, 1796. Hamilton apparently believed that a tax upon a building *even though imposed upon a tenant* would be a direct tax. See letter to Wolcott of June 6, 1797. Gibbs, I, 545. Works of Hamilton, III, 314. Under the modern economic rule would a tax upon the *use* of a house be a direct tax, and a tax upon the *use* of a carriage an excise?

The practical establishment of a rule of thumb by this "species of arbitration" had been almost universally accepted by the great legal writers of the country.

Chancellor Kent wrote with reference to the *Hylton* case:

"The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax, and a tax on land." [73]

Justice Story wrote:

"It has been seriously doubted if, in the sense of the Constitution, any taxes are direct taxes, except those on polls or on lands." [74]

Cooley, in his "Constitutional Limitations" wrote:

"The term 'direct taxes' as employed in the Constitution has a technical meaning, and embraces capitation and land taxes only." [75]

Justice Miller, in his work on the Constitution, wrote:

"Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." [76]

Hare, in his work on American Constitutional Law, wrote:

"Direct taxes, in the sense of the Constitution are poll taxes and taxes on land." [77]

This was the situation when the income tax provisions of the Wilson Tariff Law came before the Supreme Court in 1895 in the *Pollock* case above referred to. If there were ever a difficult task set before lawyers it was the task set before the able counsel who attempted to show that this income tax was a "direct tax." They must first upset the practical settlement made as a result of Hamilton's "species of arbitration." They must directly overrule the *Springer* case, the last step in this "species of arbitration." They must then begin again the search which Hamilton, one hundred years before, had said would be a vain search. They went at their work with admirable industry; they searched the libraries of the world for economic definitions of "direct taxes"; they went

[73] 1 Kent, Comm. 241.

[74] 1 Story, Const. (4th ed.) 680.

[75] (7th ed.) at p. 680.

[76] At p. 237.

[77] Vol. 1, pp. 249, 250. For quotations from other law writers see Justice White's dissenting opinion in the first decision in the Pollock case, 157 U. S. 608.

to the extent of showing that a work on taxation written by Turgot, with a certain definition of "direct taxes," was in America in 1787 and therefore *might* have been consulted by the framers of the Constitution. Every possible explanation bearing upon the economic definition was brought before the court. The majority of the court was persuaded. The tax, so far as derived from real or personal property, was held a direct tax. This portion of the tax being void because not apportioned, all of the income tax was held invalid as it constituted one entire scheme of taxation. No precise definition of "direct taxes" as opposed to "excises" or "duties" was given by the court. So far as the opinions disclose all the judges agreed that a tax upon income, derived not from property but from industry, was still left an "excise." It was also agreed that so far as the Act attempted to tax state and municipal securities, it was unconstitutional irrespective of whether it imposed a direct or an indirect tax. On the great question of what is a "direct tax" the result of the decision was to turn over the uncommonly practical question of taxation to the economists.[78]

IV.

With the above history in mind, what of the proposed Sixteenth Amendment? Governor Hughes sees in the words "from whatever source derived" the possibility, if not the probability, of the Supreme Court holding that income from State securities may be taxed. Senator Root answers that if the amendment is construed in the light of political and judicial history there is no danger of such construction. He bases this largely upon his argument that under the Constitution as it now exists, without an express limitation, the courts have held that the federal government cannot tax State and municipal securities. The same limitation will, in his opinion, be read into the Sixteenth Amendment, because the only evil aimed at was the removing of the necessity of apportionment.[79] He says:

[78]Senator Sutherland, of Utah, makes a very able defense of the majority opinion in the Pollock case in his speech in the Senate on May 17, 1909 (Cong. Rec. 44, 2080-2096); but Senator Sutherland admits that the division between direct and indirect taxation is "rather a zone than it is a line" (p. 2083). This is the result which Hamilton foresaw and tried to avert.

[79]Senator Root surely does not argue, as some others have done, that no words could give the Sixteenth Amendment the meaning that State securities were thereafter to be taxed. Of course, if the sovereign people expressly said that income from State securities was to be hereafter taxed, without apportionment, that would be the end of the matter. So far as that might be inconsistent with our dual form of government, such a form of government would be altered.

"There was no question in Congress or in the Courts or in the country about the taxation of state securities. No one claimed that the inability of the general government to tax them was an evil."

Senator Root has earned the reputation of measuring carefully his words. Is the foregoing statement one upon which he can stand?

The income tax provisions of the Wilson Tariff Act[80] were very broad. The income from State securities, however, was not specifically included. Section 27 imposed a tax upon the income of persons whether derived "from any kind of property, rents, interest, dividends or salaries or from any profession, trade, employment or vocation * * * *or from any other source whatever.*" Section 28 expressly excepted United States bonds whose terms exempted them from federal taxation. When the Act was passing through the Senate, Senator Hill, of New York, moved to except "the bonds of any state, county, municipality or town." [81] Senator Vest, who had charge of the bill in the Senate, said:

"If this income tax be constitutional it ought to be equal in its terms, and it ought to operate upon all securities alike. If we should do now what we are asked to do, what would be the inevitable result? All the State and municipal securities would immediately go to an immense premium, and all the capitalists of the country would invest in them, because we should make them by act of Congress more valuable than any other investment." [82]

Senator Hill's proposed amendment was voted upon and lost. He then offered a new amendment to except only the "bonds of any state." Senator Vest also opposed this amendment. He evidently had a different opinion as to the feeling of the country from that expressed by Senator Root, for he says:

"If I wanted to murder the bill with the people of the United States, I should put his amendment upon it. * * * Who makes investment in these bonds? Is it the man dependent upon his every day labor for subsistence? Is it the man living upon a salary even of five or six thousand dollars? It is the capitalist." [83]

This amendment was also voted upon and lost. The Act, therefore, came before the courts with the words "from any other source whatever" and with no exception in favor of State securities.

[80]Secs. 27 to 37 of the Act passed August 15th. 1894.
[81]Cong. Rec., Vol. 26, p. 6804.
[82]Cong. Rec., Vol. 26, p. 6809.
[83]Cong. Rec.. Vol. 26, p. 6811.

Counsel for Pollock, attacking the constitutionality of the law, urged that Congress clearly intended to levy a tax upon the income of State securities.[84] Counsel for the Government admitted that such was the intention. Attorney-General Olney argued as follows:

"There seems to be no good reason why the income of state and municipal securities should not be taxable by the United States when it is assessed as part of the total income of the respective owners under a law assessing income generally and not discriminating between those securities and others of like character." [85]

Mr. James C. Carter, who supported the constitutionality of the law, also argued as follows:

"There is another objection made to a distinct feature of this law, resting, not upon grounds of a failure to observe uniformity, but upon the allegation that the subject-matter upon the income of which the tax is imposed has been withdrawn from the field of federal authority and cannot be touched directly or indirectly. This is the case of state and municipal bonds, the income of which, it is said, is taxed under this law without authority. I do not doubt that it was the intention of the law to tax this income. It would be extremely unfortunate and unwise if, upon any view, this species of property were withdrawn from the sphere of federal taxation." [86]

And the court apparently agreed with counsel that it was the intention of Congress to tax State and municipal securities. Mr. Chief Justice Fuller says:

"Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds." [87]

Mr. Justice Field says:

"The law is also invalid in its provisions authorizing the taxation of the bonds and securities of the States and of their municipal bodies." [88]

But there was no tax levied upon State and municipal bonds unless the words "from any other source whatever" included such securities. True, the Supreme Court was of the opinion that Congress had no *power* to tax such securities. When the sover-

[84] (1895) 157 U. S. 429, 450.
[85] *Ibid.* 500, 501.
[86] *Ibid.* 530.
[87] *Ibid.* 583.
[88] *Ibid.* 601.

eign people speak, however, there is no question as to their power. The sole question will be as to the *meaning* of the words. Unless the Supreme Court has changed its mind since 1894, is there not a strong probability that it will hold that the words "from whatever source derived" mean what the words "from any other source whatever" then meant? [89]

In view of Senator Vest's contention in Congress, in view of the arguments of Mr. Olney and of Mr. Carter in the *Pollock* case, Senator Root cannot mean that in 1894 there was no question "in Congress or in the Courts or in the country" about the taxation of State securities. He must mean that after the Supreme Court unanimously expressed the opinion that Mr. Olney and Mr. Carter were wrong—not as to the meaning of the broad words in the Wilson Act but as to the power of Congress—all question had ceased. What, however, are the facts? Sitting in the Senate with Mr. Root when the proposed Sixteenth Amendment was framed was Senator Burkett, of Nebraska. Senator Burkett, on July 5th, 1909, voted in favor of the proposed Sixteenth Amendment; but Senator Burkett, on April 26th, 1909, in the debate upon Senator Bailey's proposed Income Tax Law, spoke as follows with reference to the taxing of State securities:

"But how are you ever going to get over the unfairness in the case of the man who has his million, say, invested in county, state, municipal, district, and United States bonds? The Senator specifically exempts them. How are you ever going to make the law fair in the case of that kind of a man, who, in my opinion, contributes the least to society and the least to the Government of any other man on earth?" [90]

We are not now concerned with a defence of this useless man who has loaned all of his property to his government. Senator Burkett's words would be of little interest standing alone. They do acquire a great interest however in the light of Senator Root's statement that "no one claimed that the inability" to tax State securities "was an evil." Senator Bailey explained to Senator Burkett that the Constitution compelled him to make such an exemption.

[89] It is fair to state that, the whole Act having been declared unconstitutional, all that is said with reference to State securities is in a sense *dictum*. The point here made is, however, that the courts, in assuming that State securities were covered by the Act, have expressed an opinion as to the meaning of the broad words, "from any other source whatever."

It may be urged that there are other broad words in the Wilson Act. Surely there are no other words that will be considered as broad as the words quoted.

[90] Cong. Rec., Vol. 44, p. 1540.

Can it not be fairly claimed that Senator Burkett at least voted for the submission of the Sixteenth Amendment, having in mind that with the Constitution so amended he would thereafter be able to "get over the unfairness" of being compelled to exempt State and municipal securities.[91]

But it should be borne in mind that the burden of proof is not upon Governor Hughes but upon Senator Root. Governor Hughes distinctly anticipates Senator Root's argument. He grants the possibility of such a construction but says that no satisfactory assurance can be given that it will be followed. We have a practical unanimity of opinion that it was the intention of Congress to tax State and municipal securities under the Wilson Law. We have two of the ablest lawyers of the United States arguing for the constitutionality of such a power. We have a strongly expressed belief on the part of many that such a construction would not be a bad thing. We pass an amendment of the Constitution to change the law as laid down in the *Pollock* case. One of the things laid down in the *Pollock* case was that State and municipal securities could not be taxed even under an income tax. The sovereign people use substantially the same language in the Sixteenth Amendment as was used by Congress in the Wilson Act, which language the Supreme Court evidently thought included State and municipal securities. What possible assurance can Senator Root give Governor Hughes that the Supreme Court will not quote again, as Chief Justice Fuller quoted in the *Pollock* case, the following words of Chief Justice Marshall:

"'It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless

[91]Another interesting light may be thrown upon Senator Root's suggestion that there is no question in the country about the taxation of State securities. Professor Seligman of Columbia University and Senator Davenport of New York apparently believe that there is no objection to taxing State and municipal securities in a general income tax (The Outlook, March 12, 1910, pp. 552-3). Governor Fort, in a special message to the New Jersey Legislature, *advocating the passage of this amendment*, takes substantially the same position. This may be a sound answer to Governor Hughes. It certainly is inconsistent with Senator Root's answer. We cannot at the same time argue (1) that the amendment cannot possibly be construed to include State securities because of the violence that such a construction would do to our dual form of government, and (2) that even if so construed no violence will be done to our dual form of government.

there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.' 4 Wheat. 518, 644." [92]

There is another objection, and perhaps a more serious one, to the proposed form of amendment. Mark that Congress has power to lay "taxes, duties, imposts and excises." "Duties, imposts and excises" only are subject to the rule of uniformity; "direct taxes" are subject to the rule of apportionment. As long ago as the *Hylton* case it was recognized that if a tax could be conceived of which was neither a direct tax nor included in "duties, imposts and excises," it would be subject to neither the rule of uniformity nor apportionment but could be laid "as Congress shall think proper and reasonable." [93]

In the *Pollock* case, Mr. Chief Justice Fuller said that "such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue." [94] If the Sixteenth Amendment is passed such a tax will have been discovered. The *Pollock* case holds distinctly that a tax on income from real and personal property is not "an excise, duty or impost" but a direct tax. The Sixteenth Amendment substantially provides that even though a direct tax, it shall not be subject to the rule of apportionment. There is not the slightest suggestion in the amendment that it is the intention of the people to make such a tax subject to the rule of uniformity. The tax upon incomes from real and personal property may be laid, in the words of Mr. Justice Chase, "by the rule of uniformity or not as Congress shall think proper and reasonable." [95] Congress may in one year lay a tax upon the incomes of the citizens of New York from real and personal property because the crops in the West have been bad; the next year they may lay such a tax upon the citizens of Nevada because the mining business has been unusually good.[96]

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[92](1895) 158 U. S. 601, 632.

[93](1796) 3 Dallas 171, 173.

[94](1895) 157 U. S. 429, 557.

[95]A tax upon income from industry, however, is left by the Pollock case an excise. The tax upon income derived from such a source, therefore, would still have to be laid by the rule of uniformity. What a muddle we are trying to rush into!

[96]An able United States Senator is reported to have stated that Congress may lay a tax upon red haired men if it chooses. Surely, a tax so capricious would violate the Fifth Amendment, requiring due process of law. How

V.

What, then, is the solution?[97] In emphasizing the point of difference between Senator Root and Governor Hughes let us not overlook their points of agreement. They both evidently believe that the majority decision in the *Pollock* case was unfortunate. Neither is impressed with the argument that the right to tax incomes should be reserved to the States. Neither shrinks from the added burden that might be thrown upon their own State of New York if the federal government should be given the power of levying an income tax in a practicable way.

Does not the history of the direct tax clause suggest the form of amendment? Why not strike out the words "and direct taxes" from Article I, Section 2, Clause 3? Also strike out all of Clause 4 of Section 9 of Article 1, which now requires a "capitation or other direct tax" to be apportioned. Insert in Article I, Section 8, Clause 1, the words "taxes" before the word "duties," to the end that taxes, as well as duties, imposts and excises shall be uniform.[98] The practical effect of this will be to do away with the distinction between direct taxes and duties, imposts and excises. It will, of course, permit a capitation tax or a direct tax upon land by the federal government under the rule of uniformity. The taxing of State and municipal securities will be left unaffected.

If the amendments are submitted in the foregoing form, able and patriotic men will be found on both sides. Those who fear a strong central government will contend that, irrespective of the origin of the apportionment rule, it has served as a useful check. They will point out the great danger of putting new sources of

much protection would be found in the Fifth Amendment, however, if Congress really based the tax upon the relative ability of the parties asked to pay is impossible to foretell. The removal of the uniformity requirement might well lead to the most surprising results.

[97]It has been suggested that the words "from whatever source derived" be stricken out of the proposed Sixteenth Amendment. Congress can now levy a tax upon incomes without apportionment; but in such a tax income from real and personal property cannot be included. It will certainly be urged that the intention of the amendment, if the words are stricken out, is merely to put beyond question the power of Congress to tax incomes *from industry* without apportionment. Moreover, if the amendment in such form should be held to cover income from real and personal property, then it would be open to the objection that as to a tax upon income from real and personal property the rule of apportionment had been abolished without a substitution of the rule of uniformity.

[98]Senator McLaurin, on July 5, 1909, proposed an amendment striking out "direct taxes" in both clauses. He apparently did not consider the further change of making "taxes" uniform. His amendment was defeated without debate. Cong. Rec. 44, 4109, 4120.

revenue into the hands of those who are far removed from their constituents who are to pay the tax. They will urge with force that the uniformity rule is only a geographical rule, and that Congress, with fewer limitations than those imposed by the State Constitutions, would be able to levy direct taxes of all kinds and grade them as they have graded an inheritance tax. On the other hand, those who believe that the national government should have the complete powers of a government, that such powers may be necessary for its protection in time of war and for its greatest development in time of peace, should be willing to do away entirely with the apportionment rule.[99] They will argue that if the power is needed, the possibility of its abuse is not a valid reason for denying its use. Surely, if we are ready to give Congress the right to levy an income tax we are not taking much additional risk to trust it with the power to levy taxes directly upon the land. So long as they can reach the land indirectly by including its income in a general income tax, it is hardly likely that they will impose a direct tax upon the land itself except in the greatest emergency.

But whether one is for or against the amendment in the form suggested above, the issue will be a clear one. We will cure an ambiguity in the way it should be cured—by going back to the clauses in question and making them mean what we want. If we are to change the Constitution at all, why not remove the "bridge" of Gouverneur Morris, the bridge which, by the admission of its author, was put into the Constitution to carry us over a gulf which has long since disappeared.

The phrase "direct taxes" is confessedly blind. Alexander Hamilton warned us that we should search in vain for a settled legal meaning. Has not our search been vain? He prophesied

[99]Senator Root believes that for the federal government to levy a tax by the apportionment rule under existing conditions "would be so unjust and inequitable as to be impossible." In the memorandum above referred to submitted by Messrs. Choate, Guthrie and others, some tables are added to "show that the rule of apportionment as a permanent standard is not in itself so grossly unfair and impracticable, even under the conditions existing to-day." Surely, a rule of taxation may properly be called "grossly unfair and impracticable" when a citizen of Mississippi must pay, for each $1,000 of property, about thirteen times as much as a citizen of Nevada. Where such inequality exists it is hardly an answer to say that when the thirteen original States as a whole are compared with the rest of the country, numbers are a fairly accurate relative measure of wealth. The burden upon the citizen of South Carolina, who is required to pay, for each $1,000 of property, more than four times as much as the citizen of New York, is not lightened by the reflection that he is helping to raise the average which the thirteen original States are paying.

that no disposition we could make of the phrase would be entirely satisfactory. Is the present disposition satisfactory? The practical settlement of the words "by a species of arbitration," which Hamilton advocated, has been overturned by the *Pollock* decision. A zone has been substituted for a boundary line. The accredited national leaders of both political parties ask the people to cure this trouble. But shall we cure a vague and ambiguous clause by a vague and ambiguous amendment? Are we so pleased with our century of experience with the blind that we must try another century with the one-eyed leading the blind?

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